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NO. 61849-1-I

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

In re the Dependency of K.N.J. and K.M.J., Minors,

STATE OF WASHINGTON/DSHS,

Respondent,

v.

MICHAEL JENKINS,

Appellant.

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STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Kenneth L. Cowser, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court did not have jurisdiction to enter the order terminating appellant's parental rights because there was never a valid dependency order entered establishing jurisdiction.

2. The trial court erred when it found the dependency order was valid despite the fact it was entered by a pro tem judge without appellant's consent.

Issue Pertaining to Assignments of Error

Prior to the termination trial, appellant moved to dismiss the case because the original dependency order was entered by a judge pro tempore without his consent, violating constitutional and statutory provisions. Appellant argued the State could not meet the elements under RCW 13.34.180(1)(a)-(c) without a valid dependency order. The trial court denied the motion, finding the dependency order was valid because the pro tem. judge was acting as a de facto judge. Alternatively, the trial court ruled the mother's stipulated dependency order was sufficient to give it authority to terminate appellant's parental rights. The trial court also found the dependency review orders (entered by elected judges) constituted an implicit finding of dependency sufficient to substitute for the dependency order. Did the trial court error?

B. STATEMENT OF THE CASE

K.N.J. was born September 19, 2005. CP 310. Her biological mother is Marquesha Everett, and appellant Michael Jenkins is her father. CP 310. Everett had custody of K.N.J. after her birth. RP 220. Everett would not permit Jenkins or his family to assist in caring for the child. RP 220-22. K.N.J. suffered extreme abuse at the hands of Everett.<sup>1</sup> RP 224; CP 225-32. In February 2006, after Everett took K.N.J. to Oregon to attend a family funeral, Jenkins and his extended family tricked Everett into letting them take K.N.J. RP 28, 221. They took her to the hospital where the abuse was discovered. RP 28, 221. K.N.J. was immediately removed from Everett's care, placed in foster care, and a dependency petition was filed in Washington. CP 260-67, 310-11.

A dependency hearing was scheduled for April 19, 2006. Supp. CP \_\_\_\_ (sub no. 17, Dependency Minute Entry, 4/18/06). Judge pro tempore Kathryn Trumbull presided. Supp. CP \_\_\_\_ (sub no. 17). Everett was present and consented to having the matter heard by a pro tem. judge. Supp. CP \_\_\_\_ (sub. 18, Consent to Judge Pro Tempore, 4/19/06). Everett stipulated to the facts necessary to support the dependency. CP 225-32.

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<sup>1</sup> Everett is currently serving a prison sentence as result of the abuse she inflicted upon K.N.J. and her rights were terminated on May 8, 2007. RP 14.

Jenkins did not appear and was not represented by counsel. The State moved to have Trumbull enter a default dependency order against Jenkins. Supp. CP \_\_ (sub. no. 19, Declaration in Support of Default, 4/19/06); Supp. CP \_\_ (sub. no. 20, Order on Preliminary Hearing, 4/19/06). Despite her pro tempore status and Jenkins' lack of consent, Trumbull did so. CP 225-32.

As the case progressed, an elected judge presided over dependency review hearings. Jenkins was not present at these hearings and was not represented by counsel. The court issued dependency review orders referencing the original default dependency order and continuing the status quo. The reviewing court did not hear proof or enter any findings establishing a dependency, but instead it relied solely on the fact of the default order as establishing the basis for the dependency. CP 81-91, 121-27, 156-163.

On February 12, 2007, the Department filed a termination petition. CP 406-420. Jenkins obtained counsel. RP 65. Prior to trial, Jenkins' counsel moved to dismiss the termination case, arguing the original dependency order was void due to lack of consent and, therefore, the State

could not prove RCW 13.34.180(1)(a)-(c).<sup>2</sup> RP 5-10, 216, 354-57; CP 10-11.

In response, the State argued the order was valid because Trumbull was acting as a de facto judge. Alternatively, it argued the dependency review orders amounted to implicit dependency findings. Finally, it argued even if the dependency order as to Jenkins was void, Everett's stipulated dependency order was sufficient to meet the requirements of RCW 13.34.180. RP 165-67, 358-364.

The trial court agreed with the State, denied Jenkins' motion to dismiss, and terminated his parental rights. CP 309-327, 358-361. Jenkins appeals. CP 4-38, 270-308.

C. ARGUMENT

THE TRIAL COURT LACKED AUTHORITY TO ENTER A TERMINATION ORDER BECAUSE SUBJECT-MATTER JURISDICTION WAS NEVER ESTABLISHED THROUGH A VALID DEPENDENCY ORDER.

It is well established that the relationship between a parent and his child involves a fundamental right that is constitutionally protected. In re Custody of Smith, 137 Wn.2d 1, 13-14, 969 P.2d 21 (1998), *aff'd sub nom*, Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d

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<sup>2</sup> The dependency order pertaining to appellant's other daughter, K.M.J., does not suffer from the same defect and was not challenged.

49 (2000) (citations omitted); U.S. Const. amends. 5, 14; Const. art. 1 §

3. The State may only regulate a parent's right to raise his or her child where the court finds the State has proved regulation is necessary to prevent harm or a risk of harm to that child. Id., at 18-19. These constitutional restrictions on State regulatory power underlie Washington's dependency statutes, which provide specific procedural steps before the State may regulate a parent-child relationship. RCW Chapter 13.34.

A juvenile court must enter a proper dependency order before it has subject matter jurisdiction over a particular parent-child relationship.<sup>3</sup> In re Key, 119 Wn.2d 600, 608, 836 P.2d 200 (1992); In re Frank, 41 Wn.2d 294, 295, 248 P.2d 553 (1952); In re Hudson, 13 Wn.2d 673, 681, 126 P.2d 765 (1942); RCW 13.34.110. This is a threshold requirement that is incorporated into the termination statute. RCW 13.34.180(1).<sup>4</sup> If there

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<sup>3</sup> A question of subject matter jurisdiction may be raised at any time. Ullom v. Renton, 5 Wn.2d 319, 322, 105 P.2d 69 (1940).

<sup>4</sup> RCW 13.34.180(1) requires the State must prove by clear, cogent, and convincing evidence:

- (a) That the child has been found to be a dependent child;
- (b) That the court has entered a dispositional order pursuant to RCW 13.34.130;

(continued...)

is not a valid dependency order, the court is without jurisdiction to deprive a parent custody of his or her child. Frank, 41 Wn.2d at 296.

In this case, the trial court's authority to enter a termination order depended on whether the State had established a valid dependency, giving the court jurisdiction to regulate the relationship between K.N.J. and Jenkins. Hence, the relevant questions here are: (1) Was the default dependency order void due to lack of consent for the appointment of a pro tem. judge? (2) If so, did the dependency review hearing orders implicitly establish the findings necessary to prove dependency? If not, did the stipulated dependency order entered as to Everett give the trial court

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<sup>4</sup>(...continued)

(c) That the child has been removed or will, at the time of the hearing, have been removed from the custody of the parent for a period of at least six months pursuant to a finding of dependency;

(d) That the services ordered under RCW 13.34.136 have been expressly and understandably offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided;

(e) That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future . . . and

(f) The continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home.

jurisdiction to terminate Jenkins' parental rights? As shown below, case law establishes the dependency order was void and the other orders did not cure this jurisdictional defect.

1. The Default Dependency Order Was Not Valid.

A case in superior court may be tried by a judge pro tempore only if certain conditions are met. Const. art. 4, § 7<sup>5</sup>; RCW 2.08.180<sup>6</sup>. One

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<sup>5</sup> Const. Art IV, § 7 provides:

The judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof, and upon the request of the governor it shall be his or her duty to do so. A case in the superior court may be tried by a judge pro tempore either with the agreement of the parties if the judge pro tempore is a member of the bar, is agreed upon in writing by the parties litigant or their attorneys of record, and is approved by the court and sworn to try the case; or without the agreement of the parties if the judge pro tempore is a sitting elected judge and is acting as a judge pro tempore pursuant to supreme court rule. The supreme court rule must require assignments of judges pro tempore based on the judges' experience and must provide for the right, exercisable once during a case, to a change of judge pro tempore. Such right shall be in addition to any other right provided by law. However, if a previously elected judge of the superior court retires leaving a pending case in which the judge has made discretionary rulings, the judge is entitled to hear the pending case as a judge pro tempore without any written agreement.

<sup>6</sup> RCW 2.08.180 provides:

(continued...)

of these conditions is the appointment of a judge pro tempore must be "agreed upon in writing by the parties litigant, or their attorneys of record . . . ." Id.; National Bank of Wash. v. McCrillis, 15 Wn.2d 345, 356, 130 P.2d 901, 144 A.L.R. 1197 (1942). Alternatively, written consent is not necessary if the parties expressly consent to the appointment in open court. State v. Belgarde, 119 Wn.2d 711, 719, 837 P.2d 599 (1992). However, mere acquiescence to an appointment does not constitute consent. Id.

The requirement that the parties consent to a judge pro tempore is jurisdictional and applies even to default orders. McCrillis, 15 Wn.2d at 347, 356, 360. Without the parties' consent, the judge pro tempore lacks jurisdiction because the constitution grants the purported pro tem. judge no authority to hear the case. Burton v. Ascol, 105 Wn.2d 344, 351, 715

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<sup>6</sup>(...continued)

A case in the superior court of any county may be tried by a judge pro tempore, who must be either: (1) A member of the bar, agreed upon in writing by the parties litigant, or their attorneys of record, approved by the court, and sworn to try the case; or (2) pursuant to supreme court rule, any sitting elected judge. Any action in the trial of such cause shall have the same effect as if it was made by a judge of such court. However, if a previously elected judge of the superior court retires leaving a pending case in which the judge has made discretionary rulings, the judge is entitled to hear the pending case as a judge pro tempore without any written agreement.

P.2d 110 (1986). The question of consent to appoint a pro tem judge may be raised at any time. State v. McNairy, 20 Wn. App. 438, 440, 580 P.2d 650 (1978).

Jenkins never consented to Trumbull's appointment. Despite this, the State asked Trumbull to enter a default dependency order. Erroneously believing she had jurisdiction over the matter, Trumbull entered the dependency order. This violated Const. art. 4, § 7 and RCW 2.08.180. As such, the original dependency order is void. See, McCrillis, 15 Wn.2d at 359.

The trial court concluded otherwise, ruling the order was valid because Trumbull was acting as a de facto judge. However, case law clearly does not support this conclusion.

The central question the trial court had to determine was whether Trumbull was acting under color of title or authority -- the hallmark of a de facto judge. The Washington Supreme Court has stated:

"A de facto judge may be defined as one who occupies a judicial office under some color of right, who exercises the duties of the judicial office under color of authority pursuant to an appointment or election thereto, and for the time being performs those duties with public acquiescence, though having no right in fact, because the judge's actual authority suffers from some procedural defect."

Cotton v. City of Elma, 100 Wn. App. 685, 700, 998 P.2d 339 (1994).

"Color of title distinguishes [the purported judge] from a usurper; active possession, despite a defect in title, distinguishes him from a de jure office holder." State v. Franks, 7 Wn. App. 594, 596, 501 P.2d 622 (1972).

Trumbull was not acting under color of title because consent is what gives a judge pro tempore title. The facts of this case are remarkably similar to those in McCrillis. 15 Wn.2d at 357. There, the Washington Supreme Court was asked to decide whether a default order issued by a purported judge pro tempore -- who had not been given consent by the parties to act in the case -- might still be valid under the theory that the order was issued by a de facto judge. After a thorough review of scholarly journals and case law from other jurisdictions, the Washington Supreme Court decided the purported judge was not acting under color of title and, hence, was not a de facto judge. It explained in detail that a judge pro tempore's authority exists only as a consequence of valid consent by the parties.

A judge pro tem., under our statute, is appointed to hear one particular case. He does not derive his authority from a general election, nor from an appointment by an executive officer, but his power to act is based upon the consent of the parties litigant to his appointment. A judge pro tem., under our statute, is not a superior court judge, and could make no claim to the office of superior court judge. We are of the opinion that it clearly appears from

the constitutional and statutory provisions that the essential element to the valid appointment of a judge pro tem. which must exist is the consent of the parties.

. . .

We are in full accord with the reasons for [de facto judge doctrine], and where the rule is properly applied it is undoubtedly a salutary one, but we do not think the rule applicable in the instant case. The position of a judge pro tem. is entirely different from that of one claiming to be a superior court judge by election or appointment. The temporary character of the authority of a judge pro tem. and the fact that only the parties litigant are concerned with his right to act, in our opinion destroy the basis for the normal rules concerning de facto judges. The parties, when they appear before a special judge, are not appearing before one who has had the general reputation in the community of being a judge, for the reason that the only case he may try is the one then before him. Nor are they appearing before one who has been elected or appointed in some manner, the legality of which the parties could not [be] expected to know. A judge pro tem. does not and could not make claim to the office of superior court judge.

Id., at 356-57, 361-62 (citations omitted). The Supreme Court held the purported pro tem. judge was not a de facto judge and the default order was void. Id., at 363.

Instead of following McCrillis, however, the trial court chose to rely on In re Marriage of Barrett-Smith, 110 Wn. App. 87, 91, 28 P.3d 1030 (2002), apparently reading it as a silent abrogation of McCrillis' holding that a pro tem. judge does not act under color of title where there is no consent. However, the trial court misread Barrett-Smith.

In Barrett-Smith, a pro tem. judge was assigned to a marriage dissolution case in accordance with a Pierce County's local policy. The local policy required the parties to pay the judge's fee directly. Division Two of the Court of Appeals determined the local rule violated RCW 2.08.180. Id., at 90. The question on appeal was whether the pro tem. judge was acting under "color of title" and, thus, a de facto judge. Division II decided that because the pro tem. judge was appointed via an existing court policy, he had apparent title to the pro tem. position and, thus, was a de facto judge. Id., at 91.

Importantly, the question of consent was not at issue in Barrett-Smith.<sup>7</sup> It appears the parties gave adequate consent for the pro tem. Judge, given the fact that the parties "hired" the pro tem. judge and did not challenge the consent requirement on appeal. Id., at 90. Thus, Barrett-Smith is not applicable to the central issue here -- whether a pro tem. judge acts under color of title without valid consent.

Given this distinction, the trial court erred when it relied on Barrett-Smith to conclude Ms. Trumbull was acting as a de facto judge. Under McCrillis, Trumbull needed Jenkins' consent before she had color of title to act. Jenkins did not give consent. As such, Trumbull was without

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<sup>7</sup> This could be why Division II never cited McCrillis in reaching its decision.

authority to enter the dependency order at issue, and it is void. McCrillis, 15 Wn.2d at 363.

2. The Dependency Review Orders Did Not Establish A Valid Dependency.

Alternatively, the trial court determined that because the dependency review hearings were held before an elected superior court judge and the review hearing orders noted "the child continued to be dependent," this cured the defective default order. CP 8. However, this conclusion is contrary to applicable case law.

The trial court cited dicta in In Re Welfare of Henderson, 29 Wn. App. 748, 630 P.2d 944 (1981), to support its conclusion that the dependency review orders amounted to an implicit finding of dependency. But Henderson has since been modified.

In Henderson, a dependency order had been entered in July 1977, under RCW 13.04.010, based on a Petition of Dependency filed in March 1977. Under the statute in effect at that time (former RCW 13.04.010), a "dependent child" was one "[w]ho has no parent . . . willing to exercise, or capable of exercising, proper parental control." This language was amended effective June 7, 1979, to provide that a dependent child is one "[w]ho has no parent . . . willing and capable of adequately caring for the child . . . ." RCW 13.34.030(2)(c).

On appeal, the mother argued the change in statutory language, which took place subsequent to the 1977 order establishing dependency, required the court make a new dependency determination. The Court of Appeals disagreed, holding the language was not so significant as to invalidate a dependency determination made under the prior definition. It went on to note also the trial court's continued out-of-home placement via three review hearing orders (made when the new law was in effect) amounted to an implicit finding of dependency under that statute.

Despite Henderson's dicta to the contrary, a subsequent decision by the Washington Supreme Court decision clarifies that dependency review hearing orders do not implicitly establish a dependency. In re Dependency of Chubb, 112 Wn.2d 719, 773 P.2d 851 (1989). In Chubb, the question before the court was whether the petitioner was entitled to appellate review of a dependency review hearing order. Chubb had been declared a dependent child. After the juvenile court continued the dependent status at a dependency review hearing, the mother sought review of that order as a matter of right. She contended each dependency review was a reestablishment of the original dependency. Chubb, 112 Wn.2d at 723.

The Supreme Court disagreed, explaining the trial court's function at dependency review hearings:

The juvenile court is not required to make the determination of dependency anew at each hearing. Its function is to determine whether court supervision should continue. Essentially, if this supervision is to continue, then what the juvenile court has decided is to abide by the status quo: the determination of dependency.

Chubb, 112 Wn.2d at 724. Hence, the continuation of out-of-home placement and court supervision is not equivalent to the establishment of a dependency. Id.

Under Chubb, the dependency review orders could not, and did not, make up for the defect in the original dependency order here. Indeed, the reviewing court was explicitly abiding by the status quo. The Dependency review orders state: "Pursuant to RCW 13.34.030, the child was found to be dependent as to the father on April 19, 2006." CP 40, 82, 129. The reviewing court never reestablished the dependency via valid findings or a valid default order, but instead it just continued the dependant status of K.N.J. by referring back to the original dependency order.

Looking at the plain language of the orders and Chubb's explanation of the trial court's function during review hearings, the dependency review orders did not reestablish the dependency or any other way cure the jurisdictional defect of the original dependency order.

3. The Dependency Order Pertaining To Everett Did Not Give The Court Jurisdiction Over The Relationship Between Jenkins And K.N.J.

Each parent maintains a parental right to his or her child -- a right that is separate and distinct from that of the other parent. In re Miller, 40 Wn.2d 319, 324, 242 P.2d 1016 (1952); see also, Ex Parte Gorden, 19 Wn.2d 714, 718, 144 P.2d 238 (1943). Jurisdiction over one parent or one child does not automatically permit a court to regulate all relationships within that family. In re Dependency of M.J.L., 124 Wn. App. 36, 42-45, 96 P.3d 996 (2004); Miller, 40 Wn.2d at 324. Instead, jurisdiction must be established as to each parent-child relationship over which the court seeks to exercise authority. Id.

Although the trial court had before it a valid dependency order pertaining to Everett and K.N.J., this order did not give it jurisdiction to terminate Jenkins's parental rights without a proper dependency order pertaining to him. The State and trial court both cited In re Welfare of Fisher, 31 Wn. App. 550, 643 P.2d 887 (1982), to support the proposition that Everett's dependency order was sufficient to permit the trial court to terminate appellant's parental rights. CP 8; RP 359. While Fisher appears to support this proposition, the Fisher court cited no case law to support this conclusion. The entire sum of its analysis is as follows:

Fisher's primary contention is that under RCW 13.34.180(1), the child was not found to be dependent as to him. We do not agree. An order was entered on December 19, 1978, finding the child to be dependent. Dependency as defined in RCW 13.34.030(2) relates to the child's status of being abandoned, abused or neglected by its parent, guardian or other custodian. There is no requirement that an order of dependency specifically state that the child is found to be dependent as to a particular parent, guardian or custodian. Such a determination is implicit in a finding of dependency.

Id., at 552.

Fisher's unsupported analysis undoubtedly stands in direct contradiction of the well-recognized concept that parent-child relationships are distinct and separate and, thus, the trial court must obtain jurisdiction over each relationship.<sup>8</sup> M.J.L., 124 Wn. App. at 42-45; Miller, 40 Wn.2d at 324; Gorden, 19 Wn.2d at 718. Therefore, to the extent Fisher suggests a court has jurisdiction over one parent's rights toward a child solely by virtue of the fact that there is a dependency order between the other parent and that child, it is wrong. Id.

Furthermore, the State never proved the facts supporting a dependency in Everett's case, thus making its reliance on her stipulated dependency order even more problematic. One parent cannot stipulate to

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<sup>8</sup> The format of the standardized dependency order used in this case suggests it is also well accepted practice in Washington courts that the trial court must establish jurisdiction over the child and each parent or guardian. See, CP 227.

the facts necessary to establish a dependency over the other parent. RCW

13.34.110(3)(a) provides:

The parent, guardian, or legal custodian of the child may waive his or her right to a fact-finding hearing by stipulating or agreeing to the entry of an order of dependency establishing that the child is dependent within the meaning of RCW 13.34.030. The parent, guardian, or legal custodian may also stipulate or agree to an order of disposition pursuant to RCW 13.34.130 at the same time. Any stipulated or agreed order of dependency or disposition must be signed by the parent, guardian, or legal custodian and his or her attorney, unless the parent, guardian, or legal custodian has waived his or her right to an attorney in open court, and by the petitioner and the attorney, guardian ad litem, or court-appointed special advocate for the child, if any. If the department of social and health services is not the petitioner and is required by the order to supervise the placement of the child or provide services to any party, the department must also agree to and sign the order.

Pursuant to this statute, Everett stipulated to facts necessary to establish a dependency and signed the stipulated order, but Jenkins did not. Given this, the stipulated dependency order simply cannot apply to Jenkins because it does not meet the requirements found in RCW 13.34.110(3)(a). Accordingly, even under statutory provisions, Everett's stipulated order of dependency did not give the trial court authority over the relationship between Jenkins and K.N.J.

In this case, the State had to procure a valid default order or prove the facts of the dependency -- which was not done. Because there is not

a valid dependency order giving the trial court jurisdiction over the relationship between Jenkins and K.N.J. -- and no other orders cure this jurisdictional defect -- the termination order must be reversed.


D. CONCLUSION

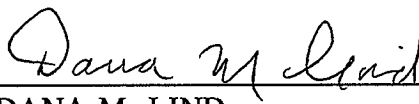
Appellant respectfully asks this Court to declare the dependency order void and reverse the termination order.

DATED this 11<sup>th</sup> day of February, 2009.

Respectfully submitted,

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MICHAEL JENKINS, )  
Appellant. )

COA NO. 61849-1-I

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2009 FEB 11 PM 4:22

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 11<sup>TH</sup> DAY OF FEBRUARY 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] TAD O'NEILL  
ATTORNEY GENERAL'S OFFICE  
3501 COLBY AVENUE  
SUITE 200  
EVERETT, WA 98201

[X] MICHAEL JENKINS  
NO. 2008023365  
SNOHOMISH COUNTY JAIL  
3025 OAKES AVENUE  
EVERETT, WA 98201

**SIGNED** IN SEATTLE WASHINGTON, THIS 11<sup>TH</sup> DAY OF FEBRUARY 2009.

x *P. Mayovsky*